NOR AZLAN MAD AZROS & ANOR.

v.

JUMAAT YUSOFF & ORS.

HIGH COURT MALAYA, SHAH ALAM
MAHADEV SHANKAR J
[CIVIL SUIT NO. 22-40-90]
10 JULY 1990

CIVIL PROCEDURE: *Dispute governed statute - Bar to seeking declaratory judgment - Original jurisdiction total absence of jurisdiction - Trade Unions Act 1959, ss. 40, 44(6), 44(9).*

At the 9th AGM of the MAS union (the union), the plaintiffs were elected secretary and treasurer respectively, however at the next AGM, the 1st plaintiff, the incumbent president and all the remaining members of the executive council were unseated. The plaintiffs contended that irregularities had occurred in the election and a declaration that the election of the office bearers were null and void and an injunction restraining them from holding office. The suit was commenced against the five principal office bearers who were elected at the 10th AGM and the scrutineers of the election. The defendants applied to have the action struck off.

Held:

[1] A dispute such as this is governed by the Trade Unions Act 1959, see ss. 40, 44(6) and 44(9). The plaintiffs did not comply with these provisions and consequently were not entitled to file this action at all as where there is a remedy prescribed by statute a declaratory judgment cannot be given by the Court in the exercise of its original jurisdiction. In this case, there was an absence of jurisdiction altogether.

[2] On the facts of this case, the inordinate delay by the plaintiffs, their waiver and misconduct are all bars to relief.

[3] Both as to content and credibility, it is not possible to reconcile the absence of any contemporaneous remedial action by the old Exco either then and there or their subsequent meeting with the various other irregularities alleged against the scrutineers.

[Defendants' application allowed.]

Cases referred to:
Kolandaisamy v. Annamalai & Anor. [1968] 1 MLJ 222
Muthuraku v. K.L. Municipality Workers Trade Union [1972] 1 MLJ 165

Legislation referred to:
Trade Union Act 1959, ss. 40, 44(6), (9)

For the plaintiffs - Sheikh Shatar; M/s. Sheikh Shatar, Cheah, Tan & Lee
For the defendant - P. Kuppusamy; M/s. P. Kuppusamy & Co.

JUDGMENT

Mahadev Shankar J:

At the 9th annual general meeting of the Malaysian Airline System Employees Union (the union) held on 24 September 1987 the plaintiffs were elected secretary and treasurer respectively. At the 10th Annual General Meeting of the union which was concluded on

8 October 1988 the first plaintiff was unseated. So was the incumbent president, Encik Abdul Halim Muda and all the remaining members of his executive council. The second plaintiff who was elected treasurer at the 9th AGM did not stand for re-election.

On 27 February 1990 these two plaintiffs filed the present action claiming, for a declaration that the election of the office bearers at the 10th AGM of the union was null and void, for an injunction to restrain them from holding office till the determination of this action, and for other ancillary reliefs. The statement of claim was subsequently amended to include an alternative claim for damages as well.

Named as defendants in this action were the five principal office bearers who were declared elected at the 10th AGM. The 6th to the 10th defendants were the Scrutineers of this election. They had been duly elected at the 9th AGM for this purpose.

The plaintiffs are complaining that certain irregularities have taken place in the election of the new office bearers, concerning the manner in which the ballot papers were distributed, and the way in which the scrutineers carried out their duties in checking and counting the votes, keeping the ballot papers in proper custody, and declaring the results on 8 October 1988.

Originally the plaintiffs applied *ex parte* for an interim injunction which I directed to be heard inter partes.

The defendants then applied to have the action struck off or stayed on a variety of grounds with which I shall now deal.

Both plaintiffs were expelled from the union on 30 January 1989 after they failed to appear at an enquiry to show cause to the contrary. It was therefore urged that they had no *locus standi* to bring this action. I cannot agree with this proposition because they were members of the union when the subject matter of this action took place.

On 22 August 1988 a special meeting of the Union Executive Council (Exco) decided that the distribution of the ballot papers for the 10th AGM do take place between 12 till 18 September 1988 at the various centres as well as the number of ballot papers to be printed, the identity of the Exco member in charge of the distribution at each centre, and the scrutineer to accompany him. There was a reference to the total membership and there was unanimous agreement that the ballot papers would be distributed by hand and signatures obtained from the recipients thereof. Two circulars followed to all Union Members on 24 August and 9 September 1988 giving them notice of the date and time of the intended distribution.

The Exco then met on 23 September 1988. The Attendance Sheet from the Minute Book is an evidence. There is no record there that any of the scrutineers attended this meeting.

The plaintiffs contend that at this meeting it was decided that in the event that there was no quorum on 24 September 1988 the 10th AGM of the union be postponed pursuant to r. 9(6) of the Union Constitution (i.e. to a date not exceeding fourteen days to be decided by the Exco), and it was further decided that in the event that the votes were not counted at the specified time the secret ballot boxes be kept at the Kelana Jaya Police Station or any other Police Station within the jurisdiction.

There was no quorum on 24 September 1988.

The scrutineers however counted the votes and thereafter deposited the secret ballot boxes at the Ampang Police Station. They deny knowledge of the Exco Meeting allegedly held on 23 September and further deny that the alleged Exco decision was communicated to them.

On 29 September 1988 there was another Special Meeting of the Exco. The minutes of this meeting are before me, signed by the first plaintiff. There is no reference here to any meeting on 23 September 1988 nor any decision taken thereat. There is a reference to the matter of counting the votes. It reads as follows:

> 2.3 Sdr. Syed Ahmad bertanya kepada Sdr. Pengerusi berkenaan panel pemerhati yang akan meneruskan tugas mereka untuk mengira undi.
>
> Sdr. Pengerusi menjawab pertanyaan tersebut. Pihak Kesatuan akan memberikan bilik khas untuk mereka.
>
> *Translation*
>
> Sdr. Syed Ahmad asked the Chairman about the panel of scrutineers who were going to carry on with their duty of counting the votes.
>
> The Chairman answered the enquiry aforesaid. The union representatives would give them a special room.

The first and second plaintiffs were present at this meeting. So was the union President Encik Halim Muda. In the cause papers before me it is being contended that the sins of the scrutineers on 24 September 1988 were such as to nullify the election. There is no mention whatsoever about them in the minutes. It therefore must follow that they were not discussed at this meeting.

What the Exco then did nevertheless was to fix the 8 October 1988 for the continuation of the AGM at 2 p.m. at the same venue i.e. the Tabong Haji Departure Hall Kelana Jaya.

As on that day there were 4128 members in benefit and entitled to vote. From the results declared it appeared that only 2611 votes were cast. Encik Halim Muda and his incumbent Exco members were decisively defeated. He polled 107 votes. The first defendant polled 711 votes. The first plaintiff polled 92 votes. His successor the second defendant polled 1185 votes. The gaps between the incumbents and the other contenders were also very wide. The Exco holding office immediately prior to 8 October 1988 are hereafter referred to as the old Exco.

At this juncture it is not irrelevant to underline the fact that according to the circulars earlier mentioned, the last date the distribution of the ballot papers was 18 September 1988. Consequently the Exco must have been well aware of how many ballot papers had been handed out well before the AGM was scheduled to commence on 24 September 1988.

The 9 October 1988 was a Sunday. On the 10 October 1988 the first plaintiff made a formal written report to the Registrar of Trade Unions that he had breached the rules in the constitution of the Union pertaining to the secret ballot in that he had failed to distribute ballot papers to all 4128 members of the union but only to 2700 members. He further reported that the members of the old Exco had met on 10 October 1988 and unanimously declared the elections void. A copy of the scrutineers report and a copy of the distribution list of secret ballot papers served on the unions members were enclosed with the letter.

The Trade Unions Act 1959 (the Act) is the relevant statute governing such matters. Section 40 of the Act covers secret ballots. By s. 44(9) the Director-General is empowered to declare a secret ballot invalid if he is satisfied that the Union has contravened any statutory provisions or any of the unions rules in carrying out such secret ballot. In the present case notwithstanding the first plaintiff's representations no such action was taken. There is no evidence before me that the plaintiffs or anybody else pursued the matter with him.

At this point I would also underline the fact that not one of the members who did not vote at the 10th A.G.M. has voiced any complaint either about the non-receipt of a ballot paper or about the way the election was run.

On 3 November 1988 the first plaintiff alone through his solicitors on record sent the new Secretary of the Union a lengthy letter complaining of various irregularities committed by the scrutineers. He requested the formal consent of the union to refer the dispute to the Registrar of Trade Unions as provided by r. 26(1) of the Union's Constitution.

The new Exco declined to give consent but counter-offered that the matter be referred to arbitration as provided by r. 26(1)(a),(b) and (c). The first plaintiff formally agreed to this by letter dated 14 December 1988.

For the purposes of the present judgment it is not necessary to set out at length the acts of the first plaintiff's solicitors and the responses of the union towards getting the arbitration going. Suffice it to say that the union did not display any conspicuous alacrity in assisting the first plaintiff to bring matters to a speedy resolution. The first plaintiff and his advisors on the other hand did not effectively set the pace unilaterally and the matter literally ended in limbo.

Thus matters were allowed to drag on until the plaintiffs' solicitors filed this action some sixteen months after the election had been concluded. In the meantime the New Exco has carried on the business of the union as usual and even concluded a cabin crew agreement in 1989.

Section 44 of the Act is a comprehensive provision which provided that disputes such as the present one "**shall** be decided in the manner directed by the rules of the trade union, and the decision so given shall be binding and conclusive on all the parties, and the application for the enforcement thereof may be made to the Sessions Court."

The provision is mandatory. Section 44(6) of the Act provides that if no decision is made on a dispute within forty days after an application to the union for a reference under its rules the aggrieved member may apply to the Sessions Court to hear and determine the dispute. It is unnecessary for me to decide here whether the omission to force the arbitrators to act within forty days of the first plaintiff's reference gave rise to a right to relief under s. 44(6) of the Act. What is obvious is that the plaintiffs were not entitled to file this action at all.

It is trite law that a declaratory judgment cannot be given by the Court in the exercise of its original jurisdiction where the only remedy open to the plaintiff is one prescribed by statute.

The present case is not one concerning the exercise of a discretionary jurisdiction but a matter where there was an absence of jurisdiction altogether. The case in point is *Kolandaisamy v. Annamalai & Anor*. [1968] 1 MLJ 222. (See also *Muthuraku v. K.L. Municipality Workers Trade Union* [1972] 1 MLJ p. 165).

A whole host of other cases were cited to me to the effect that the plaintiffs should have exhausted their domestic remedies before coming to Court. It is implied here that once the domestic remedies were exhausted this Court could acquire jurisdiction in the matter. With respect to those who hold this view, I am unable to see how it can apply to the present case because the dispute as such must here be decided by the arbitrators and the right of appeal from their decision by r. 26(5) of the union's constitution is not to a Court but to a general meeting whose decision is binding and conclusive.

Even if it was open to this Court to grant discretionary relief, (and I have just held it is not) the principles upon which the Court grants such relief is well established.

Laches is a bar. In this case the delay was inordinate, and the mitigating circumstances pleaded are not such would amount to justification in a Court of law. Waiver and misconduct on the part of the applicants are also bars to relief.

The two main complaints against the validity of these elections is the alleged failure to ensure that ballot papers reached 1428 members of the union, and the conduct of the scrutineers on 24 September 1988 in the manner in which they counted the votes and stored the ballot papers thereafter.

It is the firm opinion of this Court that the old Exco were fully aware of the facts upon which these allegations are based. The minutes of the meeting held on 29 September 1988 makes it clear that none of the Exco members thought fit to do anything about these complaints then.

So far as the scrutineers are concerned evidence has been put before the court under the hand of the Director-General of Trade Unions in a letter dated 2 April 1990 that the chief scrutineer met the Director of Trade Unions on 24 September 1988 and was advised that even though there was no quorum the counting of the votes should proceed and that the ballot boxes containing the votes could be kept in a police station for security.

As for the alleged non distribution of ballot papers to 1428 members of the union no hard evidence has been submitted to prove this. Even if it were true, they are the aggrieved party and they are not complaining. A better view of the matter in all the circumstances is that voting is not compulsory under the unions rules, and consequently there was no mandatory requirement that every member should have attended at the appointed distribution centre to collect his ballot paper and sign for it. Evidently quite a few did not. The old Exco knew the score and allowed the election to proceed on the basis of 2700 ballot papers distributed. Equity should not permit them to complain of this after the event.

Both as to content and as to credibility, I must add, that I have not found it possible to reconcile the absence of any contemporaneous remedial action by the old Exco either then and there, or at their meeting on 29 September 1988, with the various other irregularities alleged against the scrutineers. At the time, even if these irregularities did occur, the Exco did not think them sufficient to warrant calling off the elections. It does not lie in their mouths to complain about the matter now.

In conclusion I would refer to the late amendment of the statement of claim to include a prayer for damages. In the light of what I have already said this cannot improve the position of the plaintiffs.

Consequently the only order this Court can make is to allow the defendants' application and dismiss this case with costs to be taxed and paid by the plaintiffs to the defendants.

Also found at [1990] 2 CLJ 652